



PIGEON CREEK, LLC

183 IBLA 256

Decided March 29, 2013



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

PIGEON CREEK, LLC

IBLA 2012-182

Decided March 29, 2013

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting an application to purchase the Federal mineral estate. MIES 57258.

Set Aside and Remanded in Part; Affirmed in Part.

1. Applications and Entries: Generally--Federal Land Policy and Management Act of 1976: Sales

BLM may convey a Federally-owned mineral interest only when the authorized officer determines that it has no known mineral value, or that the mineral reservation is interfering with or precluding appropriate nonmineral development of the lands and that nonmineral development is a more beneficial use than mineral development. Allegation, hypothesis or speculation that such conditions could or may exist at some future time shall not be sufficient basis for conveyance. Failure to establish by convincing evidence that the requisite conditions of interference or preclusion presently exist, and that nonmineral development is a more beneficial use, shall result in the rejection of an application.

2. Administrative Practice--Administrative Review: Generally-- Appeals: Generally--Applications and Entries: Generally--Federal Land Policy and Management Act of 1976: Sales

The Secretary may rely upon the lack of known mineral values, or preclusion of, or interference with, surface development in considering whether to convey the Federal mineral estate. When a party asserts both bases in its application to purchase the mineral estate and the record supports one basis but not the other, BLM's

decision is properly set aside and remanded in part, and affirmed in part.

3. Administrative Practice--Administrative Review:
Generally--Appeals: Generally--Applications and Entries:
Generally--Federal Land Policy and Management Act of 1976: Sales

An appellant has not shown that the mere existence of a reserved Federal mineral estate is interfering with or precluding nonmineral surface development where the record shows that lots on the surface estate are being sold and houses are being built.

APPEARANCES: C. Grant Vander Veer, Esq., Grand Haven, Michigan, for Pigeon Creek, LLC; Stephen G. Mahoney, Esq., U.S. Department of the Interior, Office of the Solicitor, Pittsburgh, Pennsylvania, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pigeon Creek, LLC, the surface owner and developer of an 80-acre residential subdivision called Lakeshore Woods in Ottawa County, Michigan, has appealed from a March 28, 2012, decision of the Chief, Branch of Land and Realty, Division of Natural Resources, Eastern States Office (ESO), Bureau of Land Management (BLM), rejecting its application to purchase the Federal mineral estate underlying 40 acres of that subdivision.¹

For the reasons discussed below, BLM's decision will be set aside and remanded in part, and affirmed in part.

Factual Background

The 40 acres at issue in this appeal are situated in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of fractional sec. 33, T. 7 N., R. 16 W., Michigan Meridian, in the western half of Ottawa County, and were formerly administered by the Forest Service, U.S. Department of Agriculture. On July 17, 1959, the United States transferred the subject lands to

¹ C. Grant Vander Veer, a "member" of Pigeon Creek and an "attorney and counselor," filed the appeal. While it is not clear whether Vander Veer represents Pigeon Creek as an attorney or as a member, we find that he is qualified to appear before this Board. 43 C.F.R. § 1.3(b)(3).

Pigeon Creek's predecessors-in-interest as part of a land exchange.² The United States reserved to itself

all coal, oil, gas and other minerals, including sand, gravel, stone, clay and similar materials, together with the usual mining rights, powers and privileges, including the right at any and all times, to enter upon the land and use such parts of the surface as may be necessary in prospecting for, mining, saving and removing said minerals or materials.

Administrative Record (AR), Tab J (Pigeon Creek's Application) at Ex. 2 (1959 Deed).

The surface estate lies within the Grand Haven Charter Township (Township) in Ottawa County, Michigan, about a half-mile from Lake Michigan and south of the city of Grand Haven, and is zoned for "Planned Unit Development" (PUD). The Township approved Pigeon Creek's residential development plans in 2006. AR, Tab J at 2. Pigeon Creek avers it constructed roads and installed underground utilities, street lighting, and bike paths to serve the 83 home sites, known as Lakeshore Woods.³

By application received by BLM on October 4, 2011, serialized as MIES 57258, Pigeon Creek sought to purchase the United States' reserved mineral estate pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (2006), and its implementing regulations at 43 C.F.R. Subpart 2720. In support of the application, Pigeon Creek characterized the mineral estate as worthless, and asserted that neither the 40 acres at issue nor any adjoining land had ever produced oil, gas, or any other mineral. It provided a letter from the Grand Haven Charter Township Superintendent/Manager that confirmed the acreage in question has been "Master Planned" as a single-family residential PUD, that the required infrastructure is in place, and that "certain lots have been sold and houses

² Section 32(c) of the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 526, was amended by 56 Stat. 725 (July 28, 1942), to authorize the Secretary of Agriculture to, *inter alia*, convey Federal lands not primarily suitable for agriculture to private owners in exchange for other lands.

³ According to the application, Pigeon Creek owns 40 acres of the 80-acre Lakeshore Woods development, subdivided into 43 lots. AR, Tab J (Application) at 1. Little Pigeon LLC (Little Pigeon), Pigeon Creek's "partner in this development," owns the adjacent 40 acres, subdivided into 40 lots, and that acreage is "unencumbered by any mining or other subsurface easement of any kind." *Id.* at 3.

have been constructed.” AR, Tab J, Ex. 3 (Letter to ESO dated Sept. 28, 2011). In addition, he stated that

mining operations are a “Special Land Use” (SLU) under the Township’s Zoning Ordinance and can only occur on Agricultural zoned properties within the Township. As a result, I would be very skeptical of any SLU application to remove natural resources from this forty acre parcel given the Master Plan, existing zoning, and the existence of a residential PUD.

Because of the aforementioned and the inability to complete mining on site, I believe that any existing easement for mining has little if any market value for these forty acres.

Id. Pigeon Creek therefore asserted that “there is no potential that this easement will ever yield an ounce of minerals or a drop of oil” because the Township would never be “mined.” *See* AR, Tab J (Application) at 5.

As described by Pigeon Creek, “the federally protected wetlands of Pigeon Creek” are north of Lakeshore Woods, 90 acres of County-owned land lie to the south and are “slated to become a county park,” a summer camp positioned on the shore of Lake Michigan lies to the west, and while it acknowledges that the other half of the development without a reserved Federal mineral estate is east of the acreage at issue, Pigeon Creek offers no similar information regarding the ownership or plans for the land that lies east of the entirety of Lakeshore Woods. *Id.* at 3. Pigeon Creek alleged that “[s]ubsurface mining . . . would be inappropriate and would waste and damage the property, infrastructure and the lakeshore and wetlands environment.” *Id.* It accordingly contended that an exploratory program was not necessary, because there are no known mineral values in the land. *See* 43 C.F.R. § 2720.2.

Pigeon Creek stated that “a major residential home builder” had executed an agreement to purchase 5 lots and begin building homes “immediately,” but that builder refused to close when a title search revealed the existence of the reserved mineral estate, “fearing that the existence of the easement would be enough of an impediment in this already fragile market that buyers would not want the homes” it would build. *See* AR, Tab J (Application) at 4. Pigeon Creek states that it has been “irreparably harmed by this since that buyer/builder has now agreed to build homes on adjoining lots on the 40 acres owned by Pigeon Creek’s *competitor* Little Pigeon LLC whose lots are unencumbered by this easement.” (Emphasis added.)⁴

⁴ “Competitor” is not how Pigeon Creek initially characterized its relationship to Little Pigeon; much to the contrary, it represented that Little Pigeon is a “partner in
(continued...) ”

In response to Pigeon Creek’s application, BLM’s Northeastern States Field Office (NSFO) prepared a Mineral Report (or Report) to address the mineral potential of the 40-acre tract. *See* AR, Tab H (Memorandum from Chief, Branch of Lands and Realty, to Assistant Field Manager for Minerals – NSFO, dated Feb. 15, 2012); AR, Tab G (Mineral Report dated Feb. 27, 2012). This Report noted that the 40-acre tract lies on the southwestern flank of the Michigan Basin, which contains the Marshall Sandstone and underlying Coldwater Shale. AR, Tab G at unpaginated (unp.) 2. The Report expressly acknowledged that Ottawa County has produced oil with associated gas and industrial sand. *Id.* The eastern and southeastern parts of the County contain eight small oil fields, most of the wells have been abandoned, and those that remain are stripper oil or gas wells that produce for household use. “Very little exploration or leasing of state lands has taken place in the county since about 1985.” *Id.* The Report noted that three dry holes⁵ had been drilled in the vicinity of Lakeshore Woods between 1967 and 1969:

One well had a slight show of oil in the Reed City anhydrite, but the underlying Reed City dolomite, a reservoir rock, had no shows. Another well had a slight show of gas in Detroit River Group rocks.

Production of natural gas, gas liquids and oil from unconventional (continuous, basin-centered) reservoirs has become possible as a result of advances in drilling and well completion technology. The Antrim Shale, a thick Devonian shale with zones of high total organic content (TOC), has been producing gas in northern Michigan counties for several decades. Recently, companies have targeted Ordovician organic shales, the Collingwood and overlying Utica, using horizontal drilling techniques and staged hydrofracture completions. All interest thus far has also been confined to northern Michigan counties.

Attempts to establish oil and gas production from *conventional* reservoirs in the western half of Ottawa County have been unsuccessful, as the three dry holes in close proximity to the tract has [sic] shown.

⁴ (...continued)

this development.” *See* AR, Tab J (Application) at 3. Pigeon Creek has not submitted any evidence of its relationship to Little Pigeon or of the latter’s interest and role in the Lakeshore Woods project.

⁵ Three “IHS Energy Scout Tickets” were attached to the Mineral Report, each providing information about a dry hole. Two indicate the holes were vertically drilled, while the third provides no such information. All have a print date of Feb. 22, 2012.

The tract is *not on any structural or productive trend that would indicate the possibility of oil and gas in commercial quantities.*

At least three potential unconventional sources of oil and gas may underlie the tract. Units of the Antrim Shale have been intercepted by at least two of the proximal wells, but produced no gas shows. It is possible that the Antrim in this area is not thermally mature enough to generate hydrocarbons. The presence of the Utica/Collingwood Shales has not been documented, and depositional models indicate that the Collingwood may not be present in the area, at least not in sufficient thickness to produce commercial hydrocarbons. The Utica Shale in Michigan . . . is unlikely to be a stand-alone target for production if the Collingwood is absent.

Id. at unp. 2-3 (emphasis added).

Noting that the United States owns more than 6,800 mineral acres in Ottawa County, the Mineral Report observed that BLM issued 48 Federal leases between 1972 and 1988, but all terminated or expired “without operations.” *Id.* at unp. 3. No leases have since been issued. The NSFO conducted competitive oil and gas lease sales in the County at the end of the 1980s and into the early 1990s, but received no bids. *Id.* As of the date of the Mineral Report, the NSFO was not aware of any expressions of interest in leasing Federal minerals in Ottawa County. *Id.* at 4.⁶

The Report concluded that “[i]n spite of the lack of production in the area to date, and the obvious lack of leasing interest, the property lies within the Michigan Basin and must be considered prospectively valuable for oil and gas,” but citing Pigeon Creek’s claim that surface development is “compromised by the Federal mineral ownership,” nonetheless concluded that surface development is of greater benefit than continued Federal retention of the mineral rights, and recommended that the rights be sold to the applicant at a “nominal value of \$25.00/acre.”⁷ *Id.*

By memorandum dated March 12, 2012, the Field Manager transmitted the Mineral Report to BLM’s Deputy State Director for the Eastern States. In the memorandum, the Field Manager stated that, “[b]ased on available information, the subject property is considered to have prospective value for oil and gas, at a nominal value not to exceed \$25.00 per acre for conveyance purposes.” See AR, Tab F

⁶ We assume from the portions of the Mineral Report quoted above that these statistics refer to conventional sources of hydrocarbons only.

⁷ BLM is required to sell the mineral estate at fair market value. 43 U.S.C. § 1719(b)(2) (2006); see 43 C.F.R. § 2720.3. Nothing in the record explains or documents how the price per acre was derived.

(Memorandum from Field Manager, NSFO, to Deputy State Director, dated Mar. 12, 2012).

On March 20, 2012, when the Deputy State Director received the NSFO's Mineral Report, he also received an e-mail message from BLM's John L. Dykes, Acting Energy and Minerals Program Lead for the ESO. *See* AR, Tab E. That message stated:

I am going over the recommendation from the NSFO and I do not concur with their recommendation to sell the Mineral rights to the applicant. First of all, [section] 209 [of FLPMA] states that if there is potential for Mineral development the government will not relinquish the Mineral rights. Second, this tract lies in the Michigan Basin which contains prospective Oil and Gas development potential. Third, this tract lies within the Antrim Shale development area and falls under 2 other unconventional resource potentials. Fourth, there were wells drilled in the 1960's that had a show of Oil and Gas, but were not economic at the time. Finally, the NSFO acknowledges all the facts listed above in their Mineral Report, but recommends we relinquish the Minerals which is contrary to FLPMA 209.

For the sake of argument, if it shows potential of conventional or unconventional resource development and a return to the Treasury, we should retain the acreage.

On March 22, 2012, the NSFO re-issued the same Mineral Report, except that the final two paragraphs were revised as shown below in italics:

In spite of the lack of production in the area to date, and the obvious lack of leasing interest, the property lies within the Michigan Basin and must be considered prospectively valuable for oil and gas, especially given the recent improvements in technology that have allowed production from unconventional reservoirs.

The applicant for the mineral rights, Pigeon Creek LLC, states that the proposed residential development of the surface is compromised by the Federal mineral ownership. We conclude, however, that the proposed surface development is not being impeded by the Federal mineral ownership, and recommend that the Federal mineral rights be retained."

Id. at unpag. 4 (emphasis added).⁸

The Decision alluded to the revised Mineral Report’s finding that, because the development lies within the Michigan Basin, the mineral estate must be considered prospectively valuable for oil and gas in light of recent improvements in technology that allow production from unconventional reservoirs, and to Pigeon Creek’s claim that development was “compromised by the Federal mineral ownership.” AR, Tab C (Decision) at unpag. 1, 2. BLM rejected the application, finding that “[s]ince there are clearly mineral values in the land and there has been no showing that the mineral reservation is precluding or interfering with a more beneficial non-mineral use of the land, the application does not meet the requirements to be eligible for conveyance under Section 209(b)(1) of FLPMA.” *Id.* at unpag. 2. BLM did not otherwise explain its decision or reasoning. This appeal followed.

The Parties’ Arguments

On appeal, Pigeon Creek states that it began selling lots in 2006, and acknowledges that of the 43 lots in the west half of the development, 4 have been sold and homes have been built on 2 of them. Statement of Reasons (SOR) at 2. It identifies Eastbrook Homes, Inc., as the buyer/purchaser who refused to close on the purchase of 5 lots “as a result of this mineral easement.” *Id.* In support, Pigeon Creek refers to an e-mail message from Kathleen Adams, Eastbrook Homes, to Sandi Gentry, a real estate broker, dated June 9, 2011, in which Adams advised: “We have an issue with Oil and Gas rights on title work. We are not comfortable closing until this is removed. . . . If we build house [sic] and try to transfer to a home buyer, then they might refuse to close until it is removed, and we don’t want to take that chance.” Ex. 1 to Notice of Appeal filed with BLM at 1-2. Pigeon Creek therefore

⁸ The re-issued Mineral Report apparently did not include the “IHS Scout Tickets.” Tab E of the AR includes the revised Mineral Report and a copy of Dykes’ Mar. 20 e-mail message, as well as an image of Michigan titled “All Wells” bearing a print date of Mar. 20, 2012, and the following at the bottom of the page: http://www.michigan.gov/images/125_FrmtnAllWells_163078_7.jpg. The image depicts the State and all of its counties in white. Blue is superimposed on the image, presumably depicting all the wells of any type that have ever been drilled in Michigan. Ottawa County, and those counties immediately to the north and south of it, and almost all of the counties east of it are blue. We visited numerous pages at or through links at www.michigan.gov, including maps depicting mineral development in the State, but were unable to reach the page. While the revised Mineral Report did not address or explain the attachment, and it has not been addressed or explained on appeal, our efforts to retrieve the page confirm that oil and gas leasing in Ottawa County to date has occurred only in the east half of the County.

maintains that BLM's conclusion that it failed to show that the mineral reservation interferes with surface development constitutes "clear error." SOR at 3. Pigeon Creek further asserts "clear error" in BLM's "claim that this mineral right even has a beneficial use" when "[land[s] located within incorporated townships . . . are 'not subject to' and 'not available' for mineral leasing" under 43 C.F.R. § 3100.0-3(a)(2)(iii). *Id.*

BLM argues that its decision is properly sustained because Pigeon Creek has not met its burden of showing that the mineral reservation is interfering with or precluding housing development and that such development is a more beneficial use than development of the mineral estate. Answer at 3. More specifically, BLM contends that Pigeon Creek's claim of interference or preclusion is defeated by the fact that lots have been sold and homes have been built. BLM further contends that Pigeon Creek has failed to demonstrate or verify that Lakeshore Woods is within an incorporated city, town, or village. *Id.* at 5, 6. BLM's arguments rest on the proposition that the development

lies within the Michigan Basin, and therefore [is] considered prospectively valuable for oil and gas, especially given recent technological advancements that allow for production from unconventional reservoirs. . . . Thus, Pigeon Creek's argument that no known mineral values exist was properly disregarded because future production may still take place and the property lies within the Michigan Basin.

Id. at 4 n.1.

Standard of Review

A BLM decision rejecting an application to purchase the Federal mineral estate must be supported by the record and will be reversed only if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 43 C.F.R. § 2720.5; *El Rancho Pistachio*, 147 IBLA 205, 208 (1999); The burden is on appellant to make such showing. *David C. Burgess*, 173 IBLA 116, 124 (2007) (citing *Richard L. Dickard, Sr.*, 90 IBLA 83, 86 (1985)).

Discussion

We begin with the governing statute and regulation. Section 209 of FLPMA provides that

(a) . . . [I]f the Secretary makes the findings specified in subsection (b) of this section, the minerals *may* then be conveyed

together with the surface to the prospective surface owner as provided in subsection (b) of this section.

(b)(1) The Secretary . . . *may* convey mineral interests owned by the United States where the surface is or will be in non-Federal ownership . . . if he finds (1) that there are no known mineral values in the land, *or* (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral development of the land *and* that such development is a more beneficial use of the land than mineral development.

43 U.S.C. § 1719(a), (b) (2006) (emphasis added). BLM has no authority to convey the mineral estate unless one of these conditions is met. *David C. Burgess*, 173 IBLA at 124 (citing *Denman Investment Corp.*, 78 IBLA 311, 313 (1984)). Even if one of the two conditions has been met, however, section 209 does not create a right to conveyance, as BLM may exercise its discretion to deny an application if it determines that transfer of the Federal mineral estate is not in the public interest. *Id.* (citing *Basin Electric Power Cooperative*, 50 IBLA 197, 199 (1980)).

[1] Section 209(b) of FLPMA is implemented by rules codified as 43 C.F.R. Subpart 2720. BLM's declared policy is that:

[BLM] may convey a federally owned mineral interest only when the authorized officer determines that it has no known mineral value,⁹ or that the mineral reservation is interfering with or precluding appropriate nonmineral development of the lands and that nonmineral development is a more beneficial use than mineral development. *Allegation, hypothesis or speculation that such conditions could or may exist at some future time shall not be sufficient basis for conveyance.* Failure to establish by convincing factual evidence that the requisite

⁹ *Known mineral values* is defined as follows:

(b) *Known mineral values* means mineral rights in lands containing geologic formations that are valuable in the monetary sense for exploring, developing, or producing natural mineral deposits. The presence of such mineral deposits with potential for mineral development may be known because of previous exploration, or may be inferred based on geologic information.

43 C.F.R. § 2720.0-5(b).

conditions of interference or preclusion presently exist, and that nonmineral development is a more beneficial use, shall result in the rejection of an application.

43 C.F.R. § 2720.0-6 (emphasis added).

[2] As set forth above, a finding that there are no known mineral values in the land in question constitutes one of two situations that authorizes an exercise of the Secretary's discretion to convey the Federal mineral estate. The Secretary may rely upon the lack of known mineral values *or* interference with surface development in deciding whether to convey the mineral estate. 43 U.S.C. § 1719(b)(1) (2006); 43 C.F.R. § 2720.0-6. Where a party asserts both bases in its application and BLM relies on conclusions regarding both as the rationale for its decision rejecting the application, and the record supports one basis but not the other, BLM's decision is properly set aside and remanded in part, and affirmed in part. We will address each condition below.

Known Mineral Values

Here, we are confronted with a Mineral Report that uses virtually the same equivocating language to assess the mineral values in the parcel and yet reached opposite conclusions, not about mineral value, but about whether the fact of the mineral reservation was impeding surface development, a judgment seemingly well beyond the typical objectives of such reports. To the extent BLM's decision rested on its determination that the parcel contains known mineral values, we set it aside and remand the case for further action, because it is not clear that the Mineral Report properly assessed the known mineral values of conventional and/or unconventional reservoirs or deposits as a present matter. The preamble to the final rulemaking for the current rule codified as 43 C.F.R. § 2720.0-5(b) is instructive.

BLM anticipated that section 209 applications would typically turn on the question of whether lands contained valuable minerals. In revising the definition of *known mineral values*, it deleted the phrase "prospectively valuable" to make it clear that mineral values will be determined "in light of the current market, and to refer to lands containing mineral formations rather than to lands with underlying formations." 60 Fed. Reg. 12710 (Mar. 8, 1995) (preamble to final rule). Nonetheless, the current definition refers to the "presence of such mineral deposits *with potential* for mineral development." 43 C.F.R. § 2720.0-5(b) (emphasis added). The Mineral Report acknowledged that two of the three holes drilled near Lakeshore Woods had shows of oil or gas and, in terms of conventional reservoirs or technology at that time, were dry. Whether those shows would be deemed dry today, given the current ability to obtain production from unconventional reservoirs using today's technology, is a matter the Mineral Report did not clearly address.

Alternatively, it is not clear whether BLM was attempting to articulate the public interest in retaining the mineral estate because of the land's potential unconventional mineral resources, which industry is only now beginning to explore in Michigan. Since the lack of known mineral values constitutes a separate, alternative basis for exercising discretionary authority to convey the United States' mineral estate, we find it appropriate to set aside and remand the case in part so that BLM can issue a decision that clearly and unambiguously states its analysis and reasoning in support of the determination it reaches, considering the concerns noted in this opinion.¹⁰

Interference With or Preclusion of Surface Development

[3] In this case, Pigeon Creek admits that, like its partner, Little Pigeon, it has sold lots on which houses are being and have been built, by Eastbrook Homes and by others. Sales may not be as brisk as appellant would like, but Pigeon Creek has not shown that the reason for the pace of its sales is attributable to the existence of the mineral reservation, as opposed to the state of the economy in general, the condition of the credit and housing markets in particular, or some other factor, such as site preference, price, financing, or State or local conditions. Eastbrook stated that it does not want to take a *chance* that a buyer might refuse to close upon learning that the mineral estate has been reserved. The only evidence purporting to show that the mineral reservation is interfering with or precluding development of the surface estate is the June 9, 2011, e-mail exchange between a real estate broker and Eastbrook Homes described above. Pigeon Creek notably did not submit a ratified contract and evidence showing that Eastbrook Homes refused to close on, or thereafter abandoned, the contract. We are therefore not persuaded that Pigeon Creek has adequately shown that the mineral reservation is interfering with or precluding it from developing its surface estate. A buyer may be less eager to purchase some of the lots in Lakeshore Woods, but without more, Pigeon Creek's evidence does not establish that the mineral reservation is interfering with development.¹¹ We decline to hold that the mere existence of the mineral reservation constitutes interference with or preclusion of development.

¹⁰ In remanding this aspect of the decision, we express no opinion regarding the merits or an outcome.

¹¹ Slow sales is not the same as no sales, which could be sufficient to show that a mineral reservation is "precluding appropriate non-mineral development of the land." 43 U.S.C. § 1719(b)(1) (2006). The inability to sell encumbered lots after all the unencumbered lots have been sold also could establish preclusion, but that is not yet the case here.

Pigeon Creek also addressed the second prong of the condition authorizing BLM to convey a mineral estate, which requires that development must be “a more beneficial use of the land than mineral development.” 43 U.S.C. § 1719(b)(1) (2006). To make that showing, Pigeon Creek argues that the reserved mineral estate has no beneficial value or use because the Township will not issue permits for mineral development and the land is not available for leasing under the provisions of 43 C.F.R. § 3100.0-3(a)(2)(iii). SOR at 3. The only evidence on the topic of local zoning and permitting is the Township Superintendent/Manager’s letter dated September 28, 2011. See AR, Tab J (Application), Ex. 3 at 1. In the absence of a concrete proposal for mineral development, he could do little more than speculate and express skepticism regarding what might occur in the future. In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979), *aff’d mem.*, 445 U.S. 947 (1980), the court stated: “The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.” *Accord, South Dakota Mining Ass’n, Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). State authorities, may, however, subject mineral operations to reasonable permitting requirements. See *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 585 (1987).¹²

Pigeon Creek alternatively argues that the reserved mineral estate has no beneficial value or use because Lakeshore Woods is in an incorporated township under Michigan law and, under the Mineral Leasing Act (MLA), 30 U.S.C. § 181 (2006), and 43 C.F.R. § 3100.0-3, its lands are not available for mineral leasing. BLM responds that Pigeon Creek has not shown that a charter township properly falls within the statutory exclusion from leasing for incorporated cities, towns, and villages, or the equivalent thereof for purposes of that statute,¹³ and absent evidence to the contrary, the matter is “indeterminable.” Answer at 5-6. We must agree that more than the mere fact of incorporation and a conclusory allegation is required. It was Pigeon Creek’s burden to assemble the evidence, analysis, and argument, supported by appropriate legal authorities, to demonstrate that the statutory terms of § 181 of the MLA properly may be extended to include a charter township,

¹² Indeed, in *City of Santa Clarita v. U.S. Dep’t of the Interior*, 249 Fed. Appx. 502 (9th Cir. 2007), the court affirmed an award of attorneys’ fees to Federal agencies and a mining contractor, finding that the City and a conservation trust had initiated a series of unwarranted and harassing legal and administrative proceedings over many years in their efforts to prevent development of the reserved Federal mineral estate.

¹³ It must be noted that Congress has amended the MLA over the years, but has never seen fit to expand or alter the language making the lands of “incorporated cities, towns, or villages” unavailable for mineral leasing by including “charter or incorporated townships,” even though it presumably is aware of such entities.

whereupon BLM would be called upon to marshal its evidence and analysis to show why the opposite conclusion was warranted. Since Pigeon Creek did not do so, the unsupported assertion is rejected.¹⁴

Conclusion

We conclude that Pigeon Creek has not established that the part of BLM's decision addressing interference with or preclusion of surface development that is a more beneficial use was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, that part of the decision pertaining to known mineral values is set aside and remanded for further action, and that part of the decision pertaining to interfering with or precluding surface development and whether nonmineral development is a more beneficial use of the land than mineral development is affirmed.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge

¹⁴ Pigeon Creek is free to pursue the issue on remand. In concluding that the question must be fully briefed to justify the expansion that Pigeon Creek advocates, we express no view on the merits of the issue or the impact that such a conclusion might have on Pigeon Creek's contention that the mere existence of the mineral reservation is interfering with or precluding surface development.